UNITED STATES
v.
MICHAEL B. MARION

IBLA 78-212 Decided September 18, 1978

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring twelve placer mining claims invalid. Contest No. C-644.

Affirmed.

1. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Mining Claims: Contests--Mining Claims: Discovery: Generally--Rules of Practice: Evidence

   In mining claim contest, Government must only go forward with evidence to establish prima facie case of no discovery of valuable mineral deposits, and burden then shifts to mining claimant to prove by preponderance of evidence that his claim is valid.

2. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Mining Claims: Contests--Mining Claims: Hearings--Rules of Practice: Evidence

   Government has established prima facie case when its mineral examiner testifies that he has examined mining claims in issue and found mineral values insufficient to support finding of discovery of valuable deposits.

3. Mining Claims: Contests--Mining Claims: Discovery: Generally--Mining Claims: Discovery: Marketability

   Where contestee has not produced substantial evidence in respect to quantity

> of iron oxide ore existing on claims, or in respect to whether ore can be extracted and marketed at profit, contestee has not proved that person of ordinary prudence would be justified in further expenditure of his labor and means, with reasonable prospect of success, in developing valuable mine.

APPEARANCES: Michael B. Marion, Esq., Deisch & Marion, Denver, Colorado, and Joseph L. Sweeney, Esq., Reidy & Sweeney, Denver, Colorado, for Contestee; Charles B. Lennahan, Esq., and Jack E. Hanthorn, Esq., Office of the General Counsel, U.S. Department of Agriculture, Denver, Colorado, for the United States.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The validity of 12 placer mining claims for iron oxide is in issue in this case. The claims are situated in secs. 1, 12, 13, T. 6 S. R. 76 W., and secs. 6, 7, 18, T. 6 S. R. 75 W., sixth principal meridian, within the Arapaho National Forest in Summit County, Colorado, and cover approximately 796 acres.

The claims were located on December 9, 1972, under authority of the general mining laws, 30 U.S.C. § 22 et seq. (1970). On June 5, 1973, all but approximately 30 acres of the pertinent lands were segregated, subject to valid existing rights, from location and entry under the mining laws. 1/ At the request of the Forest Service, U.S. Department of Agriculture, the Colorado State Office, Bureau of Land Management (BLM), filed a contest complaint on September 30, 1976, alleging that the claims were invalid for various reasons of fact and law, including lack of discovery. See 43 CFR 4.451 et seq. The Government amended its complaint; the contestee answered, and following a hearing on June 16 and 17, 1977, the Administrative Law Judge held all of the claims to be invalid in a decision of December 29, 1977.

Mining claims covering the same area have been the subject of a prior Departmental adjudication. Those claims were held by the Montezuma Iron and Pigment Company, and on September 21, 1972, the BLM initiated a contest against them. Montezuma unseasonably filed an answer to the contest complaint. In a December 6, 1972, decision, the Colorado State Office declared the claims null and void based

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1/ The application for withdrawal was filed by the Department of Agriculture on May 31, 1973. See 43 CFR 2351.1. The lands were segregated effective June 5, 1973, the date on which the application was noted in the Department of the Interior's land records. See 43 CFR 2091.2-5; 43 CFR 2351.3. Exhibit 57 is a copy of the applicable serial register page.

upon this procedural failure, which has the effect of contestee's admitting the facts in the complaint. See 43 CFR 4.450-6, 4.450-7(a) and 4.451-2. Three days later, on December 9, members and staff personnel of the law firms of Montezuma's counsel, including appellant Marion, located claims on the lands involved in the instant proceeding--the same lands as had been earlier claimed by Montezuma. The several locators then quitclaimed their interest to Marion, Exhibit 30, who stated at the hearing that he held his interest in trust for the benefit of Montezuma (Tr. 360). The new locations notwithstanding, appeal was taken by Montezuma from the BLM's December 6, 1972, decision, and by our ruling of December 28, 1973, United States v. Montezuma Iron and Pigment Company, 14 IBLA 114, this Board affirmed that BLM decision.

The Government has asked that we rule on the validity of the December 9, 1972, locations under these circumstances. In view of our holding in respect to a lack of a valuable discovery on the claims, we do not deem it necessary to decide the case on the manner in which the claims were located. We note, however, that the law does not prohibit relocation where the facts are simply that a mining claimant relocates subsequent to a BLM declaration that his initial claims were invalid, and prior to any withdrawal of the lands involved.

In the instant proceeding, the Administrative Law Judge stated two bases for his decision. First, he held eight of the claims invalid because they were located by "dummy" locators. Second, the Judge held that: "All of the twelve contested claims are invalid because they were not perfected as of June 5, 1973, and are not presently supported by the discovery of a valuable mineral deposit."

On appeal, contestee Marion argues that he and his associates were bona fide locators, and that the government's complaint "did not legally place in contest" the dummy locator issue. 2/ Further, he maintains that the evidence establishes that a valuable mineral deposit had been discovered as of June 5, 1973, and existed at the time of the hearing. In its answer, the Government argues the opposite conclusion on each of these points.

As we explain below, we affirm the decision of the Administrative Law Judge on the basis of the lack of discovery of valuable mineral deposits. Thus, we find it unnecessary to decide either the dummy locator issue or other issues advanced by the Government on appeal.

2/ 43 CFR 4.450-4 requires that a contest complaint include a "statement in clear and concise language of the facts constituting the grounds of contest."

Under 30 U.S.C. § 22 and § 29 (1970), only "valuable mineral deposits" are open to exploration and patent. It is well established in the case law that a valuable mineral deposit has been discovered "where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, 19 L.D. 455, 457 (1894). This prudent man test was adopted by the United States Supreme Court in Chrisman v. Miller, 197 U.S. 313, 322 (1905); Cameron v. United States, 252 U.S. 450, 459 (1920); Best v. Humboldt Mining Company, 371 U.S. 334, 335-36 (1963). In satisfying the prudent man test, a contestee is also required to meet the marketability test set out in United States v. Coleman, 390 U.S. 599 (1968), which requires that the claimant show that "the deposit is of such a value that it can be mined, removed, and dIsposed of at a profit." See also United States v. Garner, 30 IBLA 42, 66 (1977); United States v. Kottinger, 14 IBLA 10 (1973).

As for the time at which contestee must have made a valuable discovery, we reiterate our holding in United States v. Henry, 10 IBLA 195, 199 (1973):

> Where a mining claim occupies land that has subsequently been withdrawn from mining location, the validity of the claim must be tested by the value of the mineral deposit as of the date of the withdrawal as well as at the date of determination. If the claim was not supported by a qualifying discovery of a valuable mineral deposit at the time of withdrawal, the land embraced within its boundaries would not be excepted from the effect of the withdrawal, and the claim could not thereafter become valid even though the value of the deposit subsequently increased due to a change in the market value of the mineral. [Emphasis added.]

See United States v. Garner, supra, at 66. Until a claim goes to patent, the government retains the power to declare it null and void for lack of a discovery. See Best v. Humboldt Mining Company, supra, at 337. In other words, all of contestee's claims must be presently valid, and must have been valid on June 5, 1973, in respect to those areas withdrawn on that date, if contestee is to prevail.

[1, 2] In a mining claim contest, the Government must only go forward with evidence to establish a prima facie case of no discovery of valuable mineral deposits, and the burden then shifts to the mining claimant to prove by a preponderance of the evidence that his claim is valid. United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1975); see United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), cert. denied,

419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959). The government has established a prima facie case when its mineral examiner testifies that he has examined the mining claims in issue and has found the mineral values insufficient to support a finding of a discovery of valuable deposits. United States v. Garner, supra, at 66-67. Robert G. Gnam, a geologist and mineral examiner with the Forest Service, performed such examinations on the claims disputed herein, explained his findings in detail at the hearing, and offered his conclusion that contestee had effected no discovery as of June 5, 1973, or as of the time of the hearing (Tr. 153-56). Thus, it was incumbent upon contestee to prove by a preponderance of the evidence that he had a valid discovery.

We agree with the Administrative Law Judge that contestee did not do so. Contestee presented two witnesses who testified to the effect that the claims were valid as of June 1973 and the time of the hearing. Ray E. Gilbert, a consulting geologist, concluded that a person of ordinary prudence would have been justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine (Tr. 259), and Herbert T. Young, a geologist and president of Montezuma Iron and Pigment Company (Montezuma), stated that his opinion was that "if I was allowed to go into production and having the financial resources to do so, then I could put that property on a paying profitable mining basis" (Tr. 341-42). Looking to the evidence as a whole, however, we do not find these conclusions well founded.

The most compelling failure of proof by contestee is in respect to the quantity of ore within the claims. Gilbert estimated that 1-1/2 million tons of iron oxide is present, but described this as "admittedly a very crude estimate" (Tr. 256). In explaining the method by which he arrived at this tonnage figure (Tr. 282-85), Gilbert testified that the figure was a "geologically permissive potential," which he noted was "the sort of thing that you have to start with on an exploration program." 3/ (Emphasis supplied.) Describing the term "geologically permissive potential," Gilbert stated:

> Well, I would say that it was a figure that represents a deposit that might be present based on

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3/ It is not enough that the mineral values exposed justify further exploration to determine whether actual mining operations would be warranted. In order to have a valid mining claim, valuable minerals must be exposed in sufficient quantities to justify development of the claim through actual mining operations. United States v. Bryce, 13 IBLA 340 (1973). See United States v. McClung, 31 IBLA 8 (1977); United States v. McKenzie, 29 IBLA 270 (1977); United States v. Blue Bell Gold Mining Company, 17 IBLA 182 (1974).

> the available geologic facts, that is, permissiveness comes into the picture in saying that within the area you are looking at, there are, geologically the deposit could be present, and also geologically it isn't definitively ruled out, the presence isn't definitely ruled out.
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> * * * I certainly don't want to imply that it is any sort of engineering estimate where I can say there is one-million five-hundred thousand tons of ore there. But, I am saying at this stage, there could be, and therefore, it is worth going ahead with.

Tr. 284-85.

When asked to distinguish between exploration on and actual development of the claims in issue, Gilbert said:

> [T]here is no firm line there. There is always the question of when exploration, which is mainly just looking for something, turns into development, which is generally thought of as a stage when you have a discovery and you are starting to drill out whatever kind of ore you have found, and much of my work in exploration is in the, oh, the truly exploration side of things, and I would draw the distinction there in that what you see on the Montezuma Iron and Pigment claims is at a point where I would think of as starting the development stage, that is you can see the mineralization. You have reasons to think that it may be ore, and so you are going on in and finding out how much and what the market is for it. [Emphasis supplied.]

Tr. 288-89.

Gilbert set out the discovery work he had done on the claims in two reports dated October 7, 1971, and February 7, 1972 (Exhibits E and F, respectively). The latter report contains the following statements:

> Although the deposits are exposed in a number of places by bulldozer stripping and shallow test pits, the information availab[l]e from these exposures is inadequate for determining the grade, physical characteristics, thickness, and tonnage of the deposits. * * *
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> There is little information available concerning the thickness of the deposits. * * *

> Because of sparse outcrops and lack of subsurface data, as mentioned earlier, it is also impossible, at this time, to estimate the grade and quality of material that might be mined from the deposits. The samples I have taken give some idea of the range in values that may be expected, and show that parts of the deposits are of good grade (up to 73% Fe_20_3). Those places where limonite forms a filling between talus or rubble fragments are naturally of lower grade, but available information does not permit a meaningful estimation of the overall distribution of the various grades.
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> As noted in preceding paragraphs, available information is inadequate for determining grade, physical characteristics, thickness, and lateral extent of the deposits. However, in order to have some idea about the possible size and significance of the deposits, we can make a geologic estimate of what we might reasonably hope to find, on the basis of the limited information we now have.
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> Using the above figures, we can calculate a geologically permissive potential of about 2,000,000 tons of mineable material. * * *
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> Development work may show this preliminary estimate to be greatly in error, either high or low, because I have had to make so many assumptions about parameters as yet unknown. The estimate serves to show, however, that the property has a significant ore potential, which is certainly worth continued investigation and development. [Emphasis supplied.]

Gilbert changed this 2 million ton figure at the hearing to 1-1/2 million tons, as noted above.

The February 1972 report recommended that Montezuma initially "[d]rill about 65 holes, widely distributed through an area of 475 acres, to determine the general distribution and thickness of mineralization." As a second stage, the report suggested 150 more holes at locations found promising in the prior drilling (Exhibit F, p. 3). At the hearing Gilbert testified that as of the last drilling on the claims, 23 holes had been completed, and he noted that the drilling program resulting in these holes "was only partly following the recommended drilling," and that of these 23 holes, "several

of those did not get as deep as I would have like to have gone with them" (Tr. 273-74). On page 15 of the February 1972 report, Gilbert listed the objectives of the program he recommended therein:

> 1. To determine the physical and chemical characteristics of the deposits, and their suitability for pigments or other uses,
>
> 2. To determine the reserves of mineable ore,
>
> 3. To lay the groundwork for planning an orderly mining and processing schedule.

When asked at the hearing if contestee had "achieved any of these objectives," Gilbert replied: "I would say no" (Tr. 278-79).

Contestee in his appeal brief argues that "[s]hort of actually mining the claims, it would seem that the only practical method of ascertaining quantity and quality would be to obtain and rely upon the opinions of qualified geologists." We agree that in the usual mining claim case an expert witness will be called upon to extrapolate from observed data to arrive at final quantity and quality figures for the mineral in issue, and that actual mining of the claims is not required to provide sufficient evidence. But the extrapolation procedure--which is a matter of geologic inference--is meaningless if the observed data do not lay a credible foundation for the geologic inferences drawn. In the instant case we do not find the foundation credible. Contestee's witness on quantity of ore heavily qualified his estimate of 1-1/2 million tons of iron oxide within the claims, as we have noted in detail above. There is very little evidence on the vertical extent of the deposits, and we do not find the 23 drill holes on this 796-acre tract to be adequate to establish a reliable geologic inference on quantity of ore present. We recognize that the assay reports on the ore sampled indicate the presence of iron ore of respectably high grade, 4/ but as we held in United States v. Ramsher Mining and Engineering Company Inc., 13 IBLA 268, 273 (1973): "A few assay reports indicating some high values are not substantial evidence of a discovery where there is not adequate continuity of mineralization in sufficient quantity to meet the prudent man test."

In respect of the geologic inference concept this case is analogous on the facts to United States v. The American Fluorspar Group, Inc., 25 IBLA 136 (1976), where we said at 143-44:

> Appellant makes much of the fact that some mineralization has been exposed with tonnage estimates of up to

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4/ Attachments 7 through 10 to Exhibit 34; Exhibit 44.

> 400 tons to support his contention that more mineralization occurs within the claims. It may well be in a given case that such an exposure might be sufficient if there is satisfactory additional evidence which would support geological inferences that the deposit would be more extensive and sufficient to warrant the cost of mining operations. Geological inferences may not alone be used to establish a discovery of a valuable mineral deposit; but if there are showings of sufficient mineralization and satisfactory evidence to support the inferences, they may be used as a basis for estimating the probable extent and value of the mineral deposit. * * * [case citations omitted.]
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> Every case must rest on its own factual basis, however. Here, there are differences in the theories concerning the deposition of the minerals. From the testimony of all the witnesses concerning the geological conditions on the claims, there is as much reason to infer that the mineralization does not extend in depths throughout the claims sufficient to constitute a valuable mineral deposit, as there is to support a contrary inference. There is simply insufficient factual data from which geological inferences can be made to support an estimate of the possible extent and size of a mineral deposit. Even Mr. Carlson, upon whom contestee most relies in contending there is additional mineralization, was hesitant in his opinion. He did not know whether there were any intrusives from which mineralization would be derived. He recommended drilling on all the claims, to various depths, to ascertain whether the mineralization did occur at depth and, if so, the nature and extent of the occurrence in order to ascertain what type of operation would be most feasible * * *.

The other compelling failure of proof by contestee is in respect to profitability. As we said in A. E. Kottinger, supra, citing United States v. Coleman, supra, "[u]nder the prudent man test, the claimants must show that the mineral in question can be extracted and marketed at a profit." 5/ The record in the instant case discloses

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5/ On appeal, contestee argues that the Administrative Law Judge's decision "misapprehends the law applicable in that it requires, in effect, a showing that a mine is in operation and is operating at a profit (see pages 9 and 10 of the decision)." Such an argument is without merit. We have read the Administrative Law Judge's decision and see nothing expressing or implying therein that the Judge so construed applicable law. The law on this issue is well settled. The marketability, or profitability, test is not distinct

little evidence on the question of expected profit. The extent of credible proof on this issue was testimony by Herbert Young about a contract entered into by Montezuma and the Dewey Rocky Mountain Cement Company (Dewey) in August 1971 for 1,000 short tons of ore of 45 percent iron content at $9 per ton delivered at the latter's plant in Lyons, Colorado. 6/ Exhibit 34, attachments 2, 3, 5. The iron in the ore was to be used as an additive in cement. That contract was canceled by Dewey in September 1971 because, according to the explanation given by Montezuma at the hearing, Dewey's parent company, Martin-Marietta, did not wish to be involved in the adverse

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fn. 5 (Continued)
from the prudent man test, but is merely a refinement of it. United States v. Coleman, supra, at 603. A claimant need not demonstrate to a certainty that a profit will be made, nor must he actually successfully exploit the claim to satisfy the legal standard. Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971); United States v. Harper, 8 IBLA 357, 367 (1972). The question is whether or not a prudent man would proceed in view of the anticipated profit. See United States v. Kottinger, supra at 16. 6/ Contestee maintains that there was and is a market for the iron oxide for use as a pigment in paints, but the evidence on the record will not support such an assertion. The transcript contains the following colloquy between the Judge and Young:

"JUDGE MESCH: I gather insofar as the pigment market is concerned, I may be wrong, but I gather you would like to have some testing made before you actually would know whether the material from the Montezuma claims can fill or compete in that market; is this correct?

"THE WITNESS: Yes, sir.

"JUDGE MESCH: What about the material from the standpoint of a cement additive, is any testing or research or study needed there?

"THE WITNESS: No, sir.

"JUDGE MESCH: Why do you say this?

"THE WITNESS: They are only interested in the iron content as an additive. They are not interested in color, they are not interested in -- as long as it doesn't have some excessive other foreign minerals that would bother their cement."

Tr. 337-38. See also Tr. 326-27, 335-40. Young's opinion on the pigment market possibilities for the ore in question, succinctly expressed at page 327 of the transcript, is highly subjective, and in the absence of corroborating evidence--such as a showing that a paint manufacturer considers the color tones which might be achieved with this ore acceptable for his purposes--we cannot consider such an opinion to be credible. We note that Gilbert in his February 1972 report and his testimony at the hearing expressed his opinion that suitability of the ore for paint pigment purposes had never been established (Tr. 272, 276-77).

publicity attendant to exploitation of these claims on national forest lands at the headwaters of the Snake River.

In a memorandum admitted into evidence as Exhibit N, contestee listed anticipated costs, revenues, and profits from Montezuma's proposed sale to Dewey of 6,500 tons of ore, and that memorandum indicates an expected profit of $13,000 from the total transaction. Extraction and loading of the ore by an independent contractor was to cost $1 per ton, hauling to Dewey's plant in Lyons would be $5 per ton, environmental protection and restoration is listed at $1 per ton, and Dewey was to pay $9 per ton for the delivered ore. Dewey ultimately ordered only 1,000 tons before canceling, although Young testified that the order for 1,000 tons was taken with the understanding that "we would have in the original stages 65-hundred ton [sic] per year with a possibility of working up to a maximum of 20-thousand tons per year" (Tr. 309).

The specific question in this case is whether the single-transaction profit analysis described above is sufficient to have satisfied the Coleman marketability test, as stated supra. Contestee did not submit any plans or cost and profit analyses for processing ore at its own plant. The only market contestee has suggested was available to it in 1973 and at the time of the hearing was for the delivery of raw ore, and contestee has not shown that that market was ever any larger than Dewey's Lyons, Colorado, plant, which the evidence shows was no longer a viable market as of 1973. Iron is an inherently valuable mineral and the assayed samples exhibited respectable iron content, but the burden of going forward with the evidence on this issue was contestee's, and we will not speculate as to whether raw ore could have been extracted from the claims in issue and transported to other buyers' plants in Colorado or elsewhere at a profit. We note that loading and transportation expenses were the major costs to Montezuma in the proposed sale of raw ore to Dewey, and without a showing as to these costs, we may not decide that a prudent man would proceed with the claims in issue. See United States v. Garner, supra at 67; United States v. Walls, 30 IBLA 333 (1977).

[3] Because contestee has not produced substantial evidence in respect to the quantity of iron oxide ore existing on the claims, or in respect to whether the ore can be extracted and marketed at a profit, we conclude that he has not proved that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Accordingly, contestee's claims must be declared invalid.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Anne Poindexter Lewis
Administrative Judge

We concur:

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Joan B. Thompson
Administrative Judge

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Douglas E. Henriques
Administrative Judge